STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED February 14, 2006
v	No. 256619 Saginaw Circuit Court
DERRICK LASHON BRADDOCK, Defendant-Appellant.	LC No. 03-023168-FC

Before: Wilder, P.J., and Zahra and Davis, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial convictions of first-degree home invasion, MCL 750.11a(2), assault with intent to commit murder, MCL 750.83, and two counts of possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. He was sentenced as a fourth habitual offender, MCL 769.12, to 12 to 20 years for the first-degree home invasion conviction, to life for the assault with intent to commit murder conviction, and to two years for each felony-firearm conviction. We affirm.

Defendant first argues that the trial court abused its discretion when it denied his motion for a mistrial. We disagree. We review a trial court's decision to deny a motion for a mistrial for an abuse of discretion. *People v Dennis*, 464 Mich 567, 572; 628 NW2d 502 (2001). "An abuse of discretion is found only if an unprejudiced person, considering the facts on which the trial court acted, would say there was no justification or excuse for the ruling made." *People v Snider*, 239 Mich App 393, 419; 608 NW2d 502 (2000).

"A mistrial should be granted only where the error complained of is so egregious that the prejudicial effect can be removed in no other way." *People v Gonzales*, 193 Mich App 263, 266; 483 NW2d 458 (1992). With regard to a claim of error based on extrinsic influences on the jury, our Supreme Court set forth the applicable law in *People v Budzyn*, 456 Mich 77, 88-90; 566 NW2d 229 (1997):

> A defendant tried by jury has a right to a fair and impartial jury. During their deliberations, jurors may only consider the evidence that is presented to them in open court. Where the jury considers extraneous facts not introduced in evidence, this deprives a defendant of his rights of confrontation, cross-examination, and assistance of counsel embodied in the Sixth Amendment.

> In order to establish that the extrinsic influence was error requiring reversal, the defendant must initially prove two points. First, the defendant must prove that the jury was exposed to extraneous influences. Second, the defendant must establish that these extraneous influences created a real and substantial possibility that they could have affected the jury's verdict. Generally, in proving this second point, the defendant will demonstrate that the extraneous influence is substantially related to a material aspect of the case and there is a direct connection between the extrinsic material and the adverse verdict. If the defendant establishes this initial burden, the burden shifts to the people to demonstrate that the error was harmless beyond a reasonable doubt. We examine the error to determine if it is harmless beyond a reasonable doubt because the error is constitutional in nature. The people may do so by proving that either the extraneous influence was duplicative of evidence produced at trial or the evidence of guilt was overwhelming. [Citations omitted].

We conclude that defendant has met his burden of proving that the jury pool was exposed to an extrinsic influence. The prosecutor commented in front of the jury pool that it was possible that some of the evidence the prosecution had against defendant might not be introduced at trial. In so doing, she suggested that there might be additional evidence of defendant's guilt beyond what the jury would hear.

However, defendant has failed to meet his burden of proving that this extrinsic influence created a real and substantial possibility that it could have affected the jury's verdict. The prosecutor's comments were in response to a specific point raised by a potential juror during voir dire. They were directed to ensuring that the particular potential juror could be impartial and fair if he were chosen to serve on the jury. The prosecutor's comments were extremely brief, and the prosecutor did not dwell on the point beyond what was necessary to properly question the potential juror. Additionally, the prosecutor did not indicate that evidence actually did exist that would not be presented to the jury, but rather merely stated that it was possible that some of the prosecution's evidence might be barred the rules of evidence. Under these circumstances, we conclude that defendant failed to meet his burden of proving that the extrinsic influence created a real and substantial possibility that it could have affected the jury's verdict.

Defendant next argues that the prosecutor committed misconduct, thereby denying him a fair trial. Again, we disagree. The test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial. *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001). A defendant's opportunity for a fair trial can be jeopardized "when the prosecutor interjects issues broader than the guilt or innocence of the accused." *People v Rice* (*On Remand*), 235 Mich App 429, 438; 597 NW2d 843 (1999). Prosecutorial misconduct issues are decided on a case-by-case basis, and the reviewing court must examine the record and evaluate a prosecutor's remarks in context. *People v Thomas*, 260 Mich App 450, 454; 678 NW2d 631 (2004). A prosecutor may not make a statement of fact to the jury that was unsupported by the evidence. *People v Stanaway*, 446 Mich 643, 686; 521 NW2d 557 (1994). However, a prosecutor is free to argue the evidence and all reasonable inferences arising from it, as they relate to the prosecutor's theory of the case. *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995). Neither must a prosecutor use only the least prejudicial evidence available to establish a fact at issue nor must he state the inferences in the blandest possible terms. *People v*

Fisher, 449 Mich 441, 452; 537 NW2d 577 (1995); *People v Ulla*, 216 Mich App 669, 678-679; 550 NW2d 568 (1996). Further, "'prosecutors are accorded great latitude regarding their arguments and conduct.'" *Bahoda, supra* at 282, quoting *People v Rohn*, 98 Mich App 593, 596; 296 NW2d 315 (1980).

Defendant first challenges references the prosecutor made during voir dire to the Menendez brothers, the infamous brothers who were convicted of killing their parents, arguing that these statements were so prejudicial that he was denied a fair trial. This Court set forth the law pertaining to this question in *People v Sawyer*, 215 Mich App 183, 186; 545 NW2d 6 (1996):

> The function of voir dire is to elicit sufficient information from prospective jurors to enable the trial court and counsel to determine who should be disqualified from service on the basis of an inability to render decisions impartially. In ensuring that voir dire effectively serves this function, the trial court has considerable discretion in both the scope and conduct of voir dire. What constitutes acceptable and unacceptable voir dire practice "does not lend itself to hard and fast rules."

Questioning that is necessary to determine whether a prospective juror should be excused is permissible. *People v Bell*, 209 Mich App 273, 278; 530 NW2d 167 (1995).

Viewing the prosecutor's statements in context, it is clear that, far from comparing defendant to the Menendez brothers, as defendant claims, the prosecutor referred to the Menendez brothers in an attempt to examine the prospective jurors' views regarding sympathy for defendant. Defendant is wheelchair-bound as a result of the injuries he sustained during the events giving rise to this case. The prosecutor's statements and questions were aimed at determining whether the prospective jurors could set aside any sympathy that they might feel for defendant because of his physical limitations resulting from his own conduct, and decide the case based on the evidence. As an example, the prosecutor referred to the Menendez brothers, who were sympathetic figures because they were orphans, but whose sympathetic position was of their own making. We conclude that the challenged voir dire questions and statements constituted valid probes into the potential jurors' attitudes with respect to sympathy for defendant. Accordingly, the prosecutor did not commit error mandating reversal when she made these statements.

Defendant next challenges a number of statements made by the prosecutor in her closing and rebuttal arguments. Defendant asserts that the prosecutor made four statements that constituted an improper argument of facts not in evidence. With respect to two of these statements, we conclude that this argument is without merit. There was testimony regarding blood on the doormat, and testimony indicated that defendant helped plan the home invasion. With regard to the other two statements we conclude that the prosecutor was in fact arguing facts not in evidence. Neither party presented any evidence that the complainant informed the police how much she had paid for the marijuana found in her home. Additionally, neither party presented any evidence that the complainant's robe was ever examined for the presence or absence of bullet holes. However, in both instances trial counsel immediately objected to the improper testimony. Moreover, in both instances the court immediately sustained these objections, once expressly, the other implicitly. Accordingly, these errors were cured by timely

objection. Moreover, even if a prosecutor's remarks in closing argument did constitute error, this does not entitle a defendant to reversal of his convictions when the error was cured by the court's cautionary instruction that the attorneys' arguments did not constitute evidence, *People v Hall*, 396 Mich 650, 656; 242 NW2d 377 (1976). For both of these reasons, these statements cannot form the basis for the reversal of defendant's convictions.

Defendant also asserts that the prosecutor made two statements that constituted an improper shifting of the burden of proof to defendant. With respect to the first of these statements, we conclude that this argument is without merit.

As our Supreme Court explained in *People v Fields*, 450 Mich 94, 107; 538 NW2d 356 (1995), "[w]here a witness' testimony would be privileged under the Fifth Amendment, the witness is deemed unavailable, and thus the jury may not be instructed or asked to infer that the witness would provide testimony damaging to the defendant." However,

> where a defendant testifies at trial or advances, either explicitly or implicitly, an alternate theory of the case that, if true, would exonerate the defendant, comment on the validity of the alternate theory cannot be said to shift the burden of proving innocence to the defendant. Although a defendant has no burden to produce any evidence, once the defendant advances evidence or a theory, argument on the inferences created does not shift the burden of proof.
>
> Thus, the Court of Appeals has correctly concluded that the prosecutor may comment on the weakness of defendant's alibi, and may observe that the evidence against defendant is "uncontroverted" or "undisputed," even if defendant is the only one who could have contradicted the evidence, or has failed to call corroborating witnesses . . . . [*Id*. at 115 (citations omitted).]

In the present case, defendant testified that he had won the Lottery several months before the events giving rise to this case and that he had come to the complainant's home to purchase drugs with some of his lottery winnings. Defendant then suggested that he was set up by one of his codefendants in order for that codefendant to rob him. Thus, defendant introduced an alternate theory into the case. Having done so, it was then proper for the prosecutor to comment on the strength or weakness of that theory and to argue the inferences raised by that theory and defendant's failure to produce evidence to support the theory. Accordingly, the prosecutor did not commit error in making the first of these statements.

As to the second of these statements, however, we conclude that the prosecutor did improperly shift the burden of proof to defendant. Fred Bothuel was an alleged accomplice of defendant's. If called on to testify, Bothuel's testimony would have been privileged under the Fifth Amendment. Accordingly, the prosecutor erred in asking the jury to infer that defendant did not call Bothuel to the stand because his testimony would have been adverse to defendant. *Fields*, *supra* at 107. Nonetheless, we conclude that defendant is not entitled to reversal on the basis of this error. The court's cautionary instruction cured the prosecutor's error. *Hall*, *supra* at 656.

Defendant additionally asserts that the prosecutor made two statements that constituted an improper assertion that defendant had lied. However, a prosecutor may "argue from the facts that a witness is credible or that the defendant or another witness is not worthy of belief." *People v Howard*, 226 Mich App 528, 548; 575 NW2d 16 (1997). This is exactly what the prosecutor did. Therefore, these statements also cannot form the basis for reversal of defendant's convictions on grounds of prosecutorial misconduct.

Defendant further asserts that, even if each of these alleged errors individually was insufficient to require reversal, taken cumulatively these errors entitled defendant to reversal of his convictions. The cumulative effect of errors at trial may warrant a reversal if the defendant was denied a fair and impartial trial. *People v LeBlanc*, 465 Mich 575, 591; 640 NW2d 246 (2002). However, "only actual errors are aggregated to determine their cumulative effect." *Bahoda*, *supra* at 292 n 64. In order to reverse on grounds of cumulative error, there must be errors of consequence that are seriously prejudicial to the point that the defendant was denied a fair trial. *People v Knapp*, 244 Mich App 361, 387-388; 624 NW2d 227 (2001). We conclude that defendant has failed to make this showing, because several of the errors were immediately cured by sustained timely objections, and the trial court instructed the jury that the attorneys' questions and comments were not evidence to be considered.

Defendant next argues that the trial court abused its discretion when it barred him from questioning a prosecution witness about that witness' previous criminal record and the criminal charges pending against that witness at the time of trial. We disagree. The decision whether to admit evidence is within the discretion of the trial court and will not be disturbed on appeal absent a clear abuse of discretion. *People v Starr*, 457 Mich 490, 494; 577 NW2d 673 (1988). An evidentiary error does not merit reversal in a criminal case unless, after an examination of the entire cause, it affirmatively appears that it is more probable than not that the error was outcome determinative. MCL 769.26; *People v Smith*, 243 Mich App 657, 680; 625 NW2d 46 (2000).

MRE 402 provides that all relevant evidence is admissible, except as otherwise provided by the United States or Michigan Constitutions, the Michigan Rules of Evidence, or by other rules promulgated by the Supreme Court. MRE 401 defines relevant evidence as that evidence "having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." MRE 403 provides that, "[a]lthough relevant, evidence may be excluded if the probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." MRE 404(b) provides:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material, whether such other crimes, wrongs, or acts are contemporaneous with, or prior or subsequent to the conduct at issue in the case.

To be admissible under MRE 404(b), bad acts evidence generally must satisfy three requirements: (1) it must be offered for a proper purpose, (2) it must be relevant, and (3) its probative value must not be substantially outweighed by its potential for unfair prejudice. *People v Sabin* (*On Remand*), 463 Mich 43, 55-56; 614 NW2d 888 (2000).

Defendant testified that he went to the complainant's home with his two codefendants solely to purchase drugs which he hoped to resell for profit. Defendant's theory of the case was that he had been set up, by either one or both of his codefendants, and that one or both of these men had shot him and then robbed him. Evidence that the complainant's boyfriend had a criminal record involving drug crimes and had drug charges pending at the time of the trial in this case clearly tends to make it more probable than it would be without this evidence that defendant went to the complainant's home to purchase drugs. Accordingly, we conclude that this evidence is unquestionably relevant.

However, the trial court permitted defendant to introduce evidence that police located 14 bags of marijuana in the complainant's home that evening and that a police dog indicated that there were three different spots in the home where drugs might be located. Moreover, while the prosecutor elicited testimony that the complainant, rather than her boyfriend, claimed ownership of the drugs and asserted that they were for her personal use, defendant elicited testimony that the drugs were found in a drawer containing the complainant's boyfriend's clothing and bank forms in his name. As a result, we conclude that evidence of the complainant's boyfriend's criminal record and the charges pending against him was cumulative and excludable under MRE 403. Furthermore, because this evidence was cumulative, its probative value was very low and the danger of unfair prejudice resulting from the evidence was extremely high. This being the case, this evidence also was not admissible under MRE 404(b).

Defendant next argues that the trial court committed error mandating reversal when it denied his motion for a directed verdict. Once again, we disagree. We review a trial court's decision on a motion for directed verdict de novo to determine whether the evidence, taken in the light most favorable to the prosecutor, "could persuade a rational trier of fact that the essential elements of the charged crime were proved beyond a reasonable doubt." *People v Aldrich*, 246 Mich App 101, 122-123; 631 NW2d 67 (2001).

"The elements of assault with intent to commit murder are as follows: '(1) an assault, (2) with an actual intent to kill, (3) which, if successful, would make the killing murder.'" *People v Davis*, 216 Mich App 47, 53; 549 NW2d 1 (1996), quoting *People v Warren* (*After Remand*), 200 Mich App 586, 588; 504 NW2d 907 (1993). "'The intent to kill may be proven by inference from any facts in evidence.'" *Id*. The elements of first-degree home invasion are as follows: (1) a person enters a dwelling without permission or breaks and enters a dwelling; (2) with intent to commit felony, larceny or assault in the dwelling, or commits a felony larceny or assault while entering, present in, or exiting the dwelling; and (3) the person is armed with a dangerous weapon, or another person is present in the dwelling at any time during the intruder's entering, presence in, or exiting. MCL 750.110a; *People v Sands*, 261 Mich App 158, 162; 680 NW2d 500 (2004). The elements of felony-firearm are that the defendant possessed a firearm during the commission or attempted commission of a felony. *Davis*, *supra* at 53.

The jury can infer intent from the circumstances as long as the inferences are supported from the record and are not merely speculative. *People v Jolly*, 442 Mich 458, 466; 502 NW2d 177 (1993). Moreover, because of the difficulty of proving an actor's state of mind, minimal circumstantial evidence is sufficient. *People v Fennell*, 260 Mich App 261, 270-271; 677 NW2d 66 (2004); *People v Bowers*, 136 Mich App 284, 297; 356 NW2d 618 (1984).

The prosecution presented evidence that three men broke down a garage door and a door between the garage and the complainant's home, and entered her home while she and her boyfriend were inside, and that all three men were firing guns at the complainant as they came into the home. Defendant admitted that he was one of three men who entered the complainant's home. But defendant testified that he did not have a weapon that night and that he never intended to force his way into the complainant's house or assault or kill anyone that evening. Looking at this evidence in the light most favorable to the prosecution, we conclude that the prosecution presented evidence sufficient for a rational trier of fact to be persuaded that the prosecution had proved all the elements of each of the charged crimes beyond a reasonable doubt.

Defendant next argues that the trial court abused its discretion in scoring Offense Variables (OV) 3, 4, 5, 6, 9, 10, 13 and 14. Again, we disagree. "A sentencing court has discretion in determining the number of points to be scored, provided that evidence of record adequately supports a particular score[,]" and "'scoring decisions for which there is any evidence in support will be upheld.'" *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002), noting *People v Elliott*, 215 Mich App 259, 260; 544 NW2d 748 (1996). The interpretation of the statutory sentencing guidelines and legal questions presented by the application of the guidelines are subject to de novo review. *People v Babcock*, 469 Mich 247, 253; 666 NW2d 231 (2003).

Defendant first asserts that the trial court abused its discretion when it assigned him 25 points for OV 13. This argument is without merit. MCR 777.43 states that "[o]ffense variable 13 is continuing pattern of criminal behavior." This statute provides that a defendant should be scored 25 points if the offense was part of a pattern of felonious criminal activity involving three or more crimes against a person. In scoring OV 13, the court must consider all crimes within a five-year period, including the sentencing offense, regardless of whether the offense resulted in a conviction. MCR 777.43.

Defendant contends that multiple charges resulting from a single incident cannot be counted individually in scoring OV 13, and that the trial court erred by assigning him 25 points for OV 13 on the basis of his two previous convictions for crimes against a person within the five-year period ending with the date of the charged offenses, because both of these convictions arose from the same incident. However, in *People v Harmon*, 248 Mich App 522, 524, 532; 640 NW2d 314 (2001), this Court held that concurrent convictions, and offenses occurring concurrently, may form the basis of a pattern of criminal behavior for purposes of scoring OV 13. Thus, the trial court did not abuse its discretion when it assigned defendant 25 points for OV 13 based on two assault convictions stemming from offenses occurring concurrently.

Defendant also asserts that the trial court abused its discretion when it assigned him 10 points for OV 14. This argument is without merit. MCR 777.44 provides that a defendant should be scored 10 points under OV 14 if he was a leader in a multiple offender situation.

Defendant claims the evidence failed to demonstrate that he was a leader in the events giving rise to this case. However, the prosecution presented evidence that a large man in a puffy black coat led the others into the house. Although neither the complainant nor her boyfriend were able to identify defendant as the man who led the others into the house, and although defendant denied wearing a black puffy coat on the night of these events, the prosecution also presented evidence that defendant was a large man at the time of the events giving rise to this case, weighing nearly 300 lbs., that he was shot and that the shot traveled through his back, and that the black puffy coat found at the scene of these events had a hole in the back from a gunshot. Scoring decisions for which there is any evidence in support will be upheld. *Hornsby*, *supra* at 468. The evidence supports the court's finding that defendant was a leader in the charged crimes. Accordingly, the trial court did not abuse its discretion when it assigned defendant ten points for OV 14.

Defendant also argues, citing in support *Blakely v Washington*, 542 US 296; 124 S Ct 2531, 2537; 159 L Ed 2d 403 (2004), that the trial court erred in scoring OVs 3, 4, 5, 6, 9, 13 and 14, because these scores did not reflect facts decided by the jury. However, our Supreme Court has explicitly found that *Blakely* does not apply to Michigan's indeterminate statutory sentencing scheme. *People v Claypool*, 470 Mich 715, 730 n 14; 684 NW2d 278 (2004). See also *People v Morson*, 471 Mich 1201; 683 NW2d 678 (2004). Accordingly, defendant's argument is without merit.

Defendant next argues that the trial court committed error mandating reversal when it instructed the jury on the theory of aiding and abetting, and when it failed to give a jury instruction on mere presence. Defendant further argues that trial counsel was ineffective in failing to request such an instruction. We disagree.

We review a claim of instructional error, including the question of the applicability of a particular instruction, de novo on appeal. *People v Perez*, 469 Mich 415, 418; 670 NW2d 655 (2003). With regard to a claim of ineffective assistance, a defendant bears the burden of overcoming the presumption that counsel was effective and must meet a two-pronged test to establish ineffective assistance of counsel. *Strickland v Washington*, 466 US 668, 689; 104 S Ct 2052; 80 L Ed 2d 674 (1984). First, the defendant must show that counsel's performance was deficient as measured against objective reasonableness under the circumstances and according to prevailing professional norms. *Id*. at 687-688; *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). Second, the defendant must show that the deficiency was so prejudicial that he was deprived of a fair trial, *Strickland*, *supra* at 687-688; *Pickens*, *supra* at 309, so that there is a reasonable probability that but for counsel's unprofessional error(s) the trial outcome would have been different, *People v Toma*, 462 Mich 281, 302-303; 613 NW2d 694 (2000). Moreover, constitutional error warranting reversal does not exist unless counsel's error was so serious that it resulted in a fundamentally unfair or unreliable trial. *Lockhart v Fretwell*, 506 US 364, 369-370; 113 S Ct 838; 122 L Ed 2d 180 (1993); *United States v Cronic*, 466 US 648, 658; 104 S Ct 2039; 80 L Ed 2d 657 (1984).

"An aiding and abetting instruction is proper where there is evidence that (1) more than one person was involved in the commission of a crime, and (2) the defendant's role in the crime may have been less than direct participation in the wrongdoing." *People v Head*, 211 Mich App 205, 211; 535 NW2d 563 (1995). In the present case, the complainant testified that three men entered her home and that all three were firing weapons as they entered. Although neither the

complainant nor her boyfriend could identify defendant as that man, the prosecution introduced circumstantial evidence suggesting that defendant was the first man into the home. Based on this evidence, we conclude that an aiding and abetting instruction was proper.

Defendant also asserts that the trial court committed error mandating reversal when it failed to instruct the jury regarding mere presence. This argument also lacks merit. It is true that the trial court erred in failing to give such an instruction. A mere presence instruction is appropriate where the defendant is charged as an aider and abettor. *People v Norris*, 236 Mich App 411, 419-420; 600 NW2d 658 (1999). However, considering the jury instructions as given, there is no basis for concluding that such an instruction, had it been given, would have affected the outcome of defendant's trial. The trial judge specifically instructed the jury with respect to the elements of each charged crime, including aiding and abetting. These instructions clearly required that, to find defendant guilty, the jury must find that he acted affirmatively in furtherance of the commission of the charged crimes, by either direct participation or by assisting in their commission. Thus, the jury must have concluded that defendant was not merely present at the time of the charged crimes, but rather that he participated in or aided and abetted the assault in some way. Accordingly, defendant has not shown a reasonable probability that the mere presence instruction, had it been given, would have altered the outcome of his trial. Therefore, although the trial court erred in failing to give the mere presence instruction, this error cannot form the basis for reversal of defendant's convictions.

Defendant also asserts that his trial counsel was ineffective in failing to request the mere presence instruction. This argument similarly is without merit. Because defendant was entitled to a mere presence instruction, trial counsel's performance fell below an objective standard of reasonableness under prevailing professional norms. However, defendant has not shown that a reasonable probability exists that, had the court instructed the jury on mere presence, this would have affected the outcome of the trial. Therefore, trial counsel was not ineffective in failing to either request a mere presence instruction or object to the trial court's failure to give such an instruction.

Defendant next argues that the trial court abused its discretion when it permitted the prosecution's expert witness to testify regarding what created the hole found in a jacket recovered at the scene of the crime. Defendant further argues that trial counsel was ineffective in failing to object to this testimony. We disagree. Because defendant did not preserve the evidentiary issue, review is under the test set forth in *Carines*, *supra* at 763, which requires that for relief to be possible there must have been plain error that affected substantial rights.

The admission of expert testimony requires that: (1) the witness is an expert; (2) there are facts in evidence which require or are subject to examination and analysis by a competent expert; and (3) the knowledge is in a particular area which belongs more to an expert than to the common man. *People v Beckley*, 161 Mich App 120, 125; 409 NW2d 759 (1987), aff'd 434 Mich 691 (1990). The critical inquiry is whether the expert testimony will aid the fact finder in making the ultimate decision in the case. *People v Smith*, 425 Mich 98, 105; 387 NW2d 814 (1986). In determining whether the testimony would aid the trier of fact, it is helpful to apply the "'common sense inquiry whether an untrained layman would be qualified to determine intelligently and to the best possible degree the particular issue without enlightenment'" from experts. *Id*. at 106, quoting Ladd, *Expert Testimony*, 5 Van L R 414, 418 (1952).

The expert witness at issue here was qualified in the areas of trace evidence and serology. She indicated that her expertise in trace evidence included the areas of hair and fiber comparisons, footwear and tire track comparisons, bloodstain pattern interpretation, and crime scene reconstruction, as well as serology. Thus, this witness was an expert in these areas, including the area of crime scene reconstruction, as a sub-set of the field of trace evidence. Moreover, there were facts in evidence that required or were subject to examination and analysis by a competent expert. The prosecution introduced evidence that a number of pieces of physical evidence had been submitted to the Michigan State Police Crime Lab for testing. Such facts were subject to examination and analysis by a competent expert. Further, the particular testimony given, namely that a bullet could have created a hole of the shape found in the jacket found at the scene, is in a particular area that belongs more to an expert than to the common man. The general public would not know or be able to recognize what shape a bullet would make when it passed through fabric or skin. Therefore, we conclude that the trial court did not commit plain error when it permitted the expert witness to give the above-cited testimony.

Defendant has also asserted that trial counsel was ineffective in failing to object to Hoskins' testimony regarding the star-shaped hole. However, trial counsel is not required to advocate a meritless position. *People v Riley*, 468 Mich 135, 142; 659 NW2d 611 (2003).

Defendant next argues that the prosecutor violated his due process rights by arguing different and inconsistent facts to defendant's jury than she argued before his codefendant's jury. More specifically, defendant asserts that the prosecutor impermissably argued in his trial that defendant was shot in the complainant's house, while arguing at his codefendant's trial that defendant was shot in the garage. Once again, we disagree. We review this unpreserved evidentiary issue for plain error that affected substantial rights. *Carines*, *supra* at 763.

Consistent with due process, a prosecutor may not argue facts to the jury that he believes are untrue. *Napue v Illinois*, 360 US 264, 270; 79 S Ct 1173; 3 L Ed 2d 1217 (1959). Thus, if a prosecutor secures a conviction in one trial based on a particular version of the facts, he cannot then secure a conviction in a codefendant's trial based on a different, conflicting version of those facts.

The prosecutor did not argue to the jury conflicting versions of the facts as defendant claims. In both cases the prosecutor argued that defendant was shot while inside the house and that he wound up coming to rest in the garage. Therefore, the prosecutor did not commit plain error in making this argument. The prosecutor did present differing arguments in the two trials regarding ownership of the marijuana found in the complainant's home, however, both arguments were made to the trial court outside the jury's presence and did not impact either verdict. Accordingly, defendant has failed to demonstrate that this error affected his substantial rights. *Carines*, *supra* at 763.

Defendant next argues that the prosecutor violated his due process rights by failing to disclose a criminal conviction that the complainant's boyfriend had on his record. Again, we disagree.

To establish a *Brady* violation, a defendant must prove: (1) that the state possessed evidence favorable to the defendant; (2) that the defendant did not possess the evidence nor could he have obtained it himself with any reasonable diligence; (3) that the prosecution

suppressed the favorable evidence; and (4) that had the evidence been disclosed to the defense, a reasonable probability exists that the outcome of the proceedings would have been different. *People v Lester*, 232 Mich App 262, 281; 591 NW2d 267 (1998).

Defendant has failed to establish that the prosecution possessed evidence favorable to him. Defendant asserts that the Michigan Department of Corrections (MDOC) website indicates that the complainant's boyfriend has a second-degree home invasion conviction on his record. However, at the hearing on defendant's motion, the court indicated that it had reviewed the judgment of sentence for the date on which the complainant's boyfriend was allegedly sentenced for the second-degree home invasion conviction, and that judgment of sentence did not include a conviction of second-degree home invasion. Accordingly, defendant has failed to establish that the prosecution possessed any evidence favorable to defendant or that the prosecution committed a *Brady* violation.

Defendant next argues that the trial court violated his right to be free from double jeopardy when it convicted him of, and sentenced him for, two counts of felony-firearm. Once again, we disagree. Because defendant did not preserve the evidentiary issue, our review is for plain error that affected substantial rights. *Carines*, *supra* at 763.

Defendant was charged with two counts of felony-firearm, based on the underlying counts of first-degree home invasion and assault with intent to kill. Defendant was convicted of both felony-firearm charges and sentenced to two years' imprisonment for each of these convictions. In *People v Morton*, 423 Mich 650, 656; 377 NW2d 798 (1985), our Supreme Court found a clear legislative intent that "every felony committed by a person possessing a firearm result in a felony-firearm conviction." The Court held that multiple felony-firearm convictions arising out of the same transaction did not violate double jeopardy. *Id.* at 655-656. Therefore, defendant's multiple felony-firearm convictions do not violate double jeopardy.

Defendant's final argument is that he was denied the effective assistance of counsel during sentencing. Again, we disagree.

Defendant first asserts that counsel was ineffective in failing to argue that resisting and obstructing arrest and attempted larceny from a person could not constitute "low severity convictions" for purposes of scoring Prior Record Variable (PRV) 2. This argument is without merit.

Defendant correctly asserts that his conviction for the crime of resisting and obstructing arrest cannot constitute a "low severity conviction" for purposes of scoring PRV 2. Defendant was convicted of this crime on January 11, 2001, and sentenced on February 15, 2001. Although this crime, MCL 750.479, as it currently exists constitutes a felony, until July 15, 2002, it constituted a misdemeanor. Accordingly, at the time defendant was convicted and sentenced for this crime, it was a misdemeanor offense only.

However, defendant is incorrect in his assertion that attempted larceny from a person cannot constitute a "low severity conviction." With regard to an attempted crime, MCL 777.19 provides that if an attempted offense is in class A, B, C or D, the attempt is in class E. Larceny from a person, MCL 750.357, is a class D offense. MCL 7777.16r. Therefore, the crime of attempted larceny from a person is a class E offense. MCL 777.52, which governs the scoring of

PRV 2, provides that for purposes of this variable, "prior low severity felony conviction" means a conviction for a crime listed in offense class E, F, G or H. Thus, attempted larceny from a person can constitute a "prior low severity felony conviction" for purposes of scoring PRV 2.

Moreover, MCL 777.52 provides that a defendant should be assigned 30 points if the offender has four or more prior low severity felony convictions. Here, defendant has four prior low severity felony convictions: carrying a concealed weapon, two convictions of felonious assault, and attempted larceny from a person. Thus, even without taking the resisting and obstructing conviction into consideration, the court was justified in assigning defendant 30 points for PRV 2. This being the case, trial counsel was not ineffective in failing to object. Counsel is not required to advocate a meritless position. *Snider*, *supra* at 425.

Defendant next asserts that trial counsel was ineffective in failing to investigate whether defendant's juvenile convictions were obtained without counsel. Again, however, this argument is without merit. Because no evidentiary hearing was held on this question, appellate review is limited to the existing record. *People v Watkins*, 247 Mich App 14, 30; 634 NW2d 370 (2001), aff'd 468 Mich 233 (2003). There is no evidence on the record to support defendant's assertion either that his juvenile convictions were obtained without counsel or that trial counsel failed to investigate this matter. Therefore, defendant has failed to demonstrate that trial counsel's performance was deficient in this regard.

Finally, defendant asserts that trial counsel was ineffective in failing to argue that his sentence constituted cruel and unusual punishment. This argument, too, is without merit. A sentence within the guidelines range, or which is proportionate to the offense and the offender, does not constitute cruel or unusual punishment. *People v Drohan*, 264 Mich App 77, 91-92; 689 NW2d 750 (2004). In the present case, defendant's sentence was within the guidelines. The guidelines were 225 to 750 months or life. Defendant was sentenced to 12 to 20 years on the first-degree home invasion conviction, life on the assault with intent to commit murder conviction, and to two years for each of the felony-firearms convictions. Moreover, defendant's sentence was proportionate to the offense and the offender. Accordingly, defendant's sentence did not constitute cruel and unusual punishment. As a result, trial counsel was not ineffective in failing to argue that defendant's sentence constituted cruel and unusual punishment. Counsel is not required to advocate a meritless position. *Snider*, *supra* at 425.

Affirmed.

/s/ Kurtis T. Wilder
/s/ Brian K. Zahra
/s/ Alton T. Davis